SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/04/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

E. Morgenstern
Deputy

LC 2001-000220

FILED: _____

STATE OF ARIZONA
APPELLEE

ROY E HORTON

v.

EDWARD GENE YORK
APPELLANT

MARK W HAWKINS

FINANCIAL SERVICES-CCC
REMAND DESK CR-CCC
PHX CITY MUNICIPAL COURT

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

Appellant was convicted in the Mesa City Court of being a habitual offender under Mesa City Code Section 8-6011(A) on October 5, 2000, having been found responsible for three separate civil violations of the Mesa City Code within a 24-month period of time pertaining to abandoned or junk vehicle storage. At appellant's trial, certified copies of the civil citations and default judgments entered against appellant were admitted in evidence. The trial judge, the Honorable Robin W.

Allen, issued a three-page written judgement finding appellant guilty beyond a reasonable doubt for the class 1 misdemeanor offense he had been charged. Appellant was sentenced March 20, 2001, to pay a fine of $500.00, and all surcharges were waived. Appellant filed a timely Notice of Appeal in this case.

The first issue raised by the Appellant concerns the sufficiency of the evidence to warrant the conviction and finding of guilt. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[1] All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.[2] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.[3] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[4] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[5] The Arizona Supreme Court has explained in *State v. Tison*[6] that "substantial evidence" means:

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[1] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed 2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

[2] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed. 2d 147 (1982).

[3] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed. 2d 826 (1984).

[4] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77 P.490 (1889).

[5] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

[6] SUPRA.

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[7]

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence. The evidence clearly showed findings of responsible and payment of fines by appellant for three separate civil violations of the Mesa City Code within a 24-month period of time.

Appellant next claims that the Mesa City Ordinance is unconstitutional pursuant to the Arizona and United State Constitutions in that it is unconstitutionally vague and overbroad. This court notes that Appellant failed to raise that constitutional challenge to the trial judge. Generally the failure to raise an issue before the trial judge waives appellate review of that issue, even if the alleged error is of constitutional dimension.[8] Although appellate courts generally do not consider issues which are not raised before the trial court, that rule is a procedural one rather than a jurisdictional one.[9] Constitutional issues may be raised and addressed for the first time on appeal where the issue is of state-wide importance, is raised in the context of a fully developed record, does not turn on resolution of disputed facts,

[7] Id. At 553, 633 P.2d at 362.
[8] *State v. Lefevre*, 193 Ariz. 385, 389, 972 P.2d 1021, 1025 (App. 1998).
[9] *Larsen v. Nissan Motor Corporation in USA*, 194 Ariz. 142, 978 P.2d 119 (App. 1998).

and has been fully briefed by the parties.[10] In this case, the issue of the constitutionality of the Mesa City Code Section is important to those citizens within its jurisdictional boundaries, and it appears that the record was developed fully before the trial judge. There is no dispute as to the facts: the parties stipulated to much of the evidence at trial. And, the issues have been fully briefed by both parties. It is, therefore, appropriate for this court to address the constitutional issue even though not addressed to the trial judge.

There is a strong presumption that questioned statutes and ordinances are presumed to be constitutional, and the party asserting its unconstitutionality has a burden of clearly demonstrating the unconstitutionality.[11] Whenever possible, a reviewing court should construe a statute so as to avoid rendering it unconstitutional and resolve any doubts in favor of constitutionality.[12]

A statute is unconstitutionally vague if it fails to give persons of average intelligence reasonable notice of what behavior is prohibited, or if it is drafted in such a manner that permits arbitrary and discriminatory enforcement.[13] Due process does not require that a statute be drafted with absolute precision.[14] Whenever a statute's language is unclear the courts must strive to give it a sensible construction and, if possible,

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[10] Id.; *Jiminez v. Sears, Roebuck and Company*, 183 Ariz. 399, 904 P.2d 861, (1995); *Gosewisch v. American Honda Motor Company*., 153 Ariz. 400, 737 P.2d 376, (1987); *Cutter Aviation, Inc. v. Arizona Department of Revenue*, 191 Ariz. 485, 958 P.2d 1 (App. 1997).
[11] *State v. Lefevre*, supra; *Larsen v. Nissan Motor Corporation in the United States,* supra.
[12] Id.
[13] *State v. Lefevre*, supra; *State v. Steiger*, 162 Ariz. 138, 781 P.2d 616 (App 1989).
[14] *State v. Lefevre*, supra; *State v. Takacs*, 169 Ariz. 392, 819 P. 2d 978 (App. 1991)[citing *Fuenning v. Superior Court*, 139 Ariz. 590, 680, P.2d 121 (1983)].

uphold the constitutionality if that provision.[15] An overbroad statute is a law that criminalizes conduct which is lawful and cannot be constitutionally made unlawful.[16]

Appellant's arguments concerning vagueness and overbreadth of the Mesa City Ordinance basically go to the application of that ordinance. Appellant's arguments are simply a restatement of the factual issues raised before the trial judge. Those issues were properly rejected by the trial judge given the overwhelming nature of the evidence against Appellant: The certified copies of the violations establishing that Appellant was a habitual offender within the meaning of the Mesa City Code This court has reviewed the ordinance and finds that fair notice was given to Appellant as a person of average intelligence, of the behavior and conduct which is prohibited by the ordinance. The ordinance is not vague, nor is it over-broad. Appellant's contentions are without merit.

Finally, Appellant claims that he was denied his right to due process and his right against self-incrimination because he was cited as the property owner where the abandoned junk vehicles were located, instead of the owners of the vehicles. Appellant claims that he refused to tell City Code Compliance Officer, Jay Close, the identity of the vehicles' owner. Appellant has ignored the fact that as the property owner he bears final responsibility for the property. The Mesa City Code provision makes it unlawful "for any person to cause or allow …"[17] Appellant was properly charged as the property owner. If Appellant had cooperated with Officer Jay Close and named the owner of the abandoned vehicle than that owner of the vehicle could also have been charged under the city code, as well as Appellant, but not instead of Appellant. Appellant seems to believe that he would not have been charged if he had ratted out

[15] *State v. Fuenning*, supra; see *Maricopa County Juvenile Action #JT9065297*, 181 Ariz. 69, 80, 887 P.2sd 599, 610 (App. 1994)[citing *State v. Wagstaff*, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990)]
[16] *State v. Watson*, 198 Ariz. 48, 6 P.3rd 752 (App. 2000).
[17] Mesa City Code Section 8-6-3(A)

the vehicle's owner. This was not the case. Appellant's argument must fail.

IT IS THEREFORE ORDERED affirming the judgement of guilt and sentence imposed.

IT IS FURTHER ORDERED remanding this back to the Phoenix City Court for future proceedings.